# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NORTH AMERICAN COMMERCIAL Company, plaintiff in error, *v.* THE UNITED STATES, DEFENDANT IN error. } No. 431.

**ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This suit comes originally from the circuit court of the United States for the southern district of New York. It is an action brought by the United States of America against the North American Commercial Company, now the plaintiff in error, to recover the sum of $132,187.50, with interest thereon from April 1, 1894, which amount, it is alleged by the complaint, was due from the North

American Commercial Company, the defendant, to the United States for rent reserved under a so-called lease, bearing date March 12, 1890, made by the Secretary of the Treasury to the defendant, and for royalties upon 7,500 seal skins taken and shipped by the defendant under the terms of said so-called lease, and for revenue tax at $2 each on the same number of fur-seal skins taken and shipped by the defendant. The case was tried before the judge in said circuit court without a jury, pursuant to sections 649 and 700 of the Revised Statutes. The court found for the plaintiff, and ordered judgment to be entered in their favor for $107,257.29, principal, interest, and costs, and judgment was entered June 13, 1896.

The defendant having taken a writ of error to the circuit court of appeals for the second circuit, and the cause having been there argued, that court certified a certain question arising in the cause to this court in order to obtain the instructions of this court for its proper decision. Thereupon, upon the application of the United States, this court made an order that the whole record and cause be sent up to it for consideration, pursuant to the provisions of *section 6 of the act of March 3, 1891.*

A counterclaim of the defendant against the plaintiff for damages for breach of the said lease was disallowed and dismissed by the trial court, but not on the merits thereof, and without prejudice to the right of the defendant to enforce the same by any other proper legal proceeding.

The agreement or lease out of which the cause of action arose is printed as *Appendix A* at the end of this brief.

It is declared to have been made in pursuance of *chapter 3, of Title XXIII, Revised Statutes.* It witnesses that the Secretary of the Treasury leases to the Commercial Company, for a term of twenty years from the 1st day of May, 1890, "the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals."

In consideration of the rights secured to it under the lease as above stated the North American Commercial Company on its part covenants and agrees to do the things following, that is to say: (1) To pay to the Treasurer of the United States each year during the said term of twenty years, *as annual rental,* the sum of $60,000; (2) and in addition thereto agrees to pay the revenue tax, or duty, of $2 laid upon each fur-seal skin taken and shipped by it from said islands; (3) also to pay to said Treasurer the further sum of $7.62½ apiece for each and every fur-seal skin taken and shipped from said islands; (4) also to pay the sum of 50 cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period of twenty years; (5) to secure the prompt payment of the $60,000 rental above referred to, the company agrees to deposit with the Secretary of the Treasury United States bonds to the amount of $50,000 face value, to be held as a guaranty for the annual payment of said $60,000 rental; (6) to furnish to the native inhabitants of said islands annually such quantity or number of dried salmon, and such quantity of salt, and such number of salt barrels

for preserving their necessary supply of meat, as the Secretary of the Treasury shall from time to time determine; (7) to furnish to said inhabitants 80 tons of coal annually, and a sufficient number of comfortable dwellings; to keep said dwellings in repair; to provide and keep in repair necessary schoolhouses, and to establish and maintain schools for the education of children; all to the satisfaction of the Secretary of the Treasury—together with other miscellaneous provisions relating to the internal economy of the islands.

The lease further provided as follows:

> The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the 1st day of April, 1891.
>
> The company also agrees to employ the native inhabitants of the islands to perform such labor upon the islands as they are fitted for.
>
> The company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and all matters pertaining to said islands and the taking of seals within the possession of the United States; and to obey and abide by any restrictions and limitations upon the right to kill seals, that the Secretary of the Treasury shall judge necessary under the law for the preservation of the seal fisheries of the United States; and it agrees that it will not kill or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

The claim of the Government may be tabulated as follows:

| | |
|---|---|
| Annual rental | $60,000.00 |
| Revenue tax, 7,500 fur-seal skins taken and shipped, at $2 | 15,000.00 |
| 7,500 fur-seal skins, at $7.62½ apiece | 57,187.50 |
| Total | 132,187.50 |

Upon this sum interest was claimed from April 1, 1894.

The islands of St. Paul and St. George became a part of the territory of the United States by cession from Russia in 1868. By an act passed July 1, 1870, *Ch. 189 (16 Stat., 180)*, entitled "*An act to prevent the extermination of fur-bearing animals in Alaska*," the times and manner of taking and killing various fur-bearing animals in the Territory of Alaska were regulated and defined. The act relates more especially to seals, although various other fur-bearing animals are specifically mentioned. The act directed that the right to engage in the business of taking fur seals on the islands of St. Paul and St. George, and the right to send a vessel or vessels to said islands for the skin of such seals, should be leased to proper and responsible parties by the Secretary of the Treasury for a period of not less than twenty years. The islands were made a Government reservation, and strict provisions were enacted to secure to the lessee the rights made the subject of the lease, as well as to preserve the fur-seal fishery. In 1874 this act and certain earlier statutes were incorporated into the Revised Statutes, as *chapter 3 of Title XXIII, sections 1954–1976.*

The first lease was made under the act of July 1, 1870, to the Alaska Commercial Company, and was dated as

of May 1, 1870. Its term was twenty years. That lease having expired, the present lease, dated May 1, 1890, was made to the plaintiff in error.

The sixth finding of fact by the trial court states the nature and habit of the herd of seals which resort to these islands annually. (Rec., p. 23.)

The evidence discloses that prior to 1890 the number of seals annually resorting to these islands was rapidly diminishing. This, as is well known, was attributed to the open sea or pelagic sealing, whereby the seals, especially the females, who were exempt from slaughter under the laws of the United States, were intercepted on their passage to the islands by the crews of foreign vessels and killed in great numbers while in the water. During the first year, under the present lease, the plaintiff in error was able to secure only 21,000 skins of the proper character. (Evidence of Charles J. Goff, Rec., p. 82.)

For several years prior to 1890 the United States, asserting that it had territorial jurisdiction over Bering Sea, had been striving to prevent vessels of foreign nations from seal hunting on the open waters of that sea. It had become evident that if the seal fishery was to be preserved, some regulations of an international character must be made. Open-sea sealing was largely carried on by Canadian vessels sailing from ports of British Columbia, or by American vessels sailing under the British flag from those ports. Great Britain denied the territorial jurisdiction of the United States over Bering Sea, and denied that the United States had a right of property in the fur seals when on the high seas during their

progress to or from the islands of St. Paul and St. George.

It became necessary, therefore, to resort to international regulation to prevent the extermination of the seals pending the dispute between Great Britain and the United States upon this subject. The Treasury agent in charge made a report to the Secretary of the Treasury after the season of 1890, in which he strenuously urged the necessity of prohibiting sealing absolutely for a number of years upon the islands as a necessary measure for the preservation of the seals. (Plaintiff's Exhibit 41, Rec., pp. 166, 172.)

In consequence of these representations and of the rapid diminution of the number of fur seals on the islands, an agreement was entered into with Great Br tain known as a *modus vivendi*, which was proclaimed by the President on June 15, 1891. By this agreement the President, on behalf of the United States, agreed to prohibit the killing of fur seals by citizens of the United States in Bering Sea and upon the islands of St. Paul and St. George, except 7,500 to be taken on the islands for the subsistence and care of the natives. Great Britain on its part agreed to prohibit fur sealing by subjects of Great Britain in Bering Sea during the continuance of the *modus*. (27 St. L., 980.)

The purpose of this agreement is in the preamble stated to be the avoidance of irritating differences and to promote the friendly settlement of the questions pending between the two Governments touching their respective rights in Bering Sea, and *for the preservation of the*

*seal species.* The prohibition contained in this agreement was to continue until May, 1892.

The differences between the two Governments had not been adjusted by the first of May, 1892, but by a convention proclaimed May 9, 1892, the two Governments agreed to arbitrate their differences in Bering Sea arising out of the efforts of the United States to preserve the fur seals.

By the latter agreement the United States Government agreed to prohibit seal killing during the pendency of the arbitration in Bering Sea and on the shores of the islands thereof, the property of the United States, in excess of 7,500, to be taken on the islands for the subsistence of the natives. This prohibition continued until the fall of 1893 and covered the killing period of the year for which recovery is sought in this case.

This last convention was ratified by the Senate of the United States April 19, 1892. This agreement is in the preamble said to be intended as a "*restrictive regulation for seal hunting.*"

The findings of the trial court as to the taking of seals by the defendant during the year 1893 are as follows:

> Tenth. That, pursuant to such agreement, the United States prohibited and prevented the said defendant from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease.
>
> Eleventh. That the Secretary of the Treasury did not exercise the discretion conferred upon him by section 1962 of the Revised Statutes, to limit the right of killing seals when necessary for the preser-

vation of such seals, and did not so limit or restrict the right of the said defendant to take seals under its said lease for the year 1893, and that during that year it was not necessary or even desirable for the preservation of such seals to limit the killing of the seals upon the said islands to the said number of 7,500, specified in the said *modus vivendi*.

Twelfth. That in the year 1893 the United States Government itself, through the agents of the Treasury Department, took upon the said islands 7,500 seals; that the said defendant was permitted to cooperate in selecting the seals so killed, and to take, and it did take and retain, the skins of those seals, and in this way, and in this way only, the defendant received those 7,500 skins.

In accordance with the power reserved to him in said contract, the Secretary of the Treasury, at the commencement of the seal-killing season for the year ending April 1, 1894, fixed the compensation of the natives upon the islands of St. Paul and St. George, to be paid to them by the defendant for killing the seals, sorting the skins, and loading them on board the defendant's steamer, at 50 cents for each skin taken from the islands during the said season; and defendant paid to the natives said compensation, to wit, the sum of $3,750. (Rec., p. 24.)

The court also found as a conclusion of law that the defendant, having received the said 7,500 seal skins taken from the islands during the year 1893, is liable to pay the plaintiff therefor the sum of $94,687.50, with interest thereon from the 1st day of April, 1894; and the plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the defendant.

CONTENTIONS OF THE PLAINTIFF IN ERROR.

On behalf of the plaintiff in error it is claimed:

1. That the provision contained in section 1962, Revised Statutes, as follows:

> But the Secretary of the Treasury may limit the right of killing if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper,

applies to the lease of the plaintiff in error, although it was made after the expiration of the period of twenty years from July 1, 1870, mentioned in said section, and that therefore, if the 7,500 skins actually received and shipped by the plaintiff in error during the year 1893 are to be considered as taken under the lease, the United States can recover rent only in the proportion that 7,500 bears to 100,000, and the rental should be reduced accordingly; and the plaintiff in error claims that this reduction applies not only to the specific annual rental of $60,000, but also to the per capita sum of $7.62½ for each and every seal taken, etc. Computed according to this rule, the amount due to the United States would be $23,789.50, which sum the plaintiff in error tendered to the United States before action was brought.

2. That the *modus vivendi* operated as a total suspension of the benefits of the lease, and relieved the defendant from the covenants for the payment of rent and royalty, and therefore that the complaint should have been dismissed.

3. By way of counterclaim, the plaintiff in error contends that it could have taken during the season of 1893

20,000 fur-bearing seals without unreasonable injury to or diminution of the herd, but that being limited by the terms of the treaty to 7,500 seals, the lessee was damaged to the extent of $283,725.

STATEMENT OF THE STATUTES AS THEY WERE MAY 1, 1890.

I desire, at the outset, to call attention to the actual state of the laws governing the subject under discussion at the time this lease was made.

It is comprised in sections 1956 to 1976, Revised Statutes, and an amendment approved March 24, 1874.

The act approved July 1, 1870, which was entitled, "An act to prevent the extermination of fur-bearing animals in Alaska," had been incorporated into the Revised Statutes, and was no longer in force as a distinct statute.

It will be perceived, on a perusal of the act of 1870, and of the Revised Statutes, sections 1956 to 1976, that the object the Government had in view was the preservation by proper regulation of the fur-bearing animals of Alaska, including seals, but not seals exclusively.

The Islands of St. Paul and St. George are, by section 1959, made a special reservation for *Government purposes*, and it is declared unlawful for any person even to land on either island, except by authority of the Secretary of the Treasury.

Section 1960 forbade killing of fur-bearing seals on these islands except during June, July, September, and October in each year.

It also forbade killing seals by use of firearms, or by other means tending to drive the seals away from those islands.

Section 1961 forbade the killing of female seals or any seal less than one year old; also the killing of seals in the water, or on the beaches, cliffs, or rocks where they haul up to remain.

Section 1962 fixes the maximum number which may be killed for their skins on each island *for the period of twenty years from July 1, 1870.*

Section 1963 provides that when the outstanding lease to the Alaska Commercial Company expires, or is surrendered, forfeited, or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government and the protection of the fisheries, *the right of taking fur seals on said islands and of sending a vessel or vessels to the islands for the skins of such seals* for the term of twenty years, at an annual rental of not less than $50,000.

The act of March 24, 1874, amends, in effect, the Revised Statutes in the following particulars:

1. By section 1960 the months of June, July, September, and October were designated as the months in which fur seals might be taken on the islands for their skins.

The amendment authorizes the Secretary of the Treasury to designate the months in which fur seals may be taken for their skins on the islands and in the waters adjacent thereto.

2. By section 1962 the maximum number which might be killed upon the island of St. Paul was limited to 75,000 per annum, and upon the island of St. George it was 25,000 per annum.

The act of March 24, 1874, authorizes the Secretary of the Treasury to designate the number to be taken on and about each island respectively.

Thus Congress substituted the discretion of the Secretary of the Treasury for its own previously fixed judgment, in two particulars: first, the months in which seals might be killed; secondly, the number that might be killed on each island, respectively.

It is to be observed that in the latter particular the Secretary was left without any limitation whatever. He could authorize the taking of more than an aggregate of 100,000 seals from the two islands, or he could authorize the taking of a less number than 100,000 in the aggregate. He could also authorize more or less than 75,000 for St. Paul and more or less than 25,000 for St. George. In a word, the times of killing and both the maximum and minimum number to be killed were left to the judgment of the Secretary.

This appears to be the plain, natural, reasonable meaning of this legislation. The meaning of it is so clear and free from doubt that any person dealing with the Secretary of the Treasury upon this subject under these statutes should be expected to count upon exactly that, and no other construction.

EXAMINATION OF THE LEASE.

This, then, being the state of the law, let us examine the lease which the plaintiff in error took. The learned counsel for the plaintiff in error, referring to the making of the present lease, asserts (Brief, p. 5):

> When the right was again put up, everyone, of course, supposed that the maximum was the same, and subject to the same discretion in the Secretary.

There is not the slightest evidence in the case to show what anyone *supposed* with reference to the law in the case. The only presumption is that everyone supposed the law to be exactly what the law plainly declared; but since the learned counsel has referred to the announcement made at the time of the bidding, and since the call for bids and the bids of the defendant company have been put in evidence, it is proper to refer to them to see if we can infer from anything which is a matter of record what the parties really did suppose.

The advertisement contains this provision (Ex. 1, Rec., p. 84):

> The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to 60,000, and for the succeeding years the number will be determined by the Secretary of the Treasury in accordance with the provisions of law.

The plaintiff in error put in three bids, Nos. 10, 11, and 12. (Rec., p. 101, etc.) Each bid offered a gross sum as rental and a *per capita* royalty in addition to the revenue tax. Bids Nos. 10 and 12 were higher in the *per capita* royalty offered than bid No. 11, but bid

No. 10 contained a proviso that it was conditional on a guaranty by the United States that the bidder should be allowed to take 100,000 seals in each and every year of the lease without reduction by the Secretary. Bid No. 12 was conditioned on the express proviso that the United States should prevent all seal hunting in Bering Sea. Bid No. 11 (Rec., p. 105) was absolute, containing no conditions whatever. The latter was the one accepted by the Government. This bid recited the advertisement of the Secretary at length. It is important to observe that the plaintiff in error, in making its several bids, desired to discriminate between a lease which would allow the taking of 100,000 seals in each year without reduction, a lease which would be conditioned on the prevention of all seal hunting in Bering Sea, and such a lease as was called for by the advertisement.

Of course, no matter what the language of the advertisement for the bids, if the lease is plain and unambiguous, the bids and advertisements can not be resorted to in order to give a different meaning to its language.

It is submitted that the language of the lease is clear, unambiguous, and without any uncertainty which justifies resort to extraneous evidence in order to interpret it.

With reference to the lease, it is to be observed that it takes effect after the expiration of the twenty years mentioned in Revised Statutes, 1962. That period expired July 1, 1890, and the right to kill under the new lease began on the expiration of the old lease.

What was leased?

> The exclusive right to engage in the business of taking fur seals on the islands of St. George and

St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

What did the company undertake?

First. To pay to the Treasurer of the United States each year during said term of twenty years as annual rental the sum of $60,000, and in addition thereto to pay the revenue tax or duty of $2 laid upon each fur-seal skin taken and shipped by it from said islands, and also to pay the further sum of $7.62½ apiece for each and every fur-seal skin taken and shipped from said islands.

Second. Faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury had theretofore or might thereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands, and the taking of seals within the possessions of the United States.

Third. To obey and abide by any restrictions and limitations upon the right to kill seals that the Secretary of the Treasury should adjudge necessary under the law for the preservation of the seal fisheries of the United States.

Fourth. That it would not kill, or permit to be killed, so far as it could prevent, in any year, a greater number of seals than should be authorized by the Secretary of the Treasury.

The lease fixed the number of fur seals to be killed for their skins during the year ending May 1, 1891, the first year of the lease, at a maximum of 60,000.

This was only a method of fixing, at the date of the lease, the number that might be killed for the first year. For the succeeding years the number was to be regulated

by the Secretary of the Treasury, as provided by the act of March 24, 1874.

So that the very covenants of the lease were made to conform to the interpretation which the Government puts upon the act of March 24, 1874, namely, that the lessee should not kill in any year a greater number of seals than should be *authorized* by the Secretary of the Treasury.

*Argument.*

FIRST POINT.

SECTION 1962, REVISED STATUTES, HAS NO APPLICATION TO THE CONTRACT OF THE PLAINTIFF IN ERROR. THE PROVISIONS OF THAT SECTION EXPIRED WITH THE TERMINATION OF THE PERIOD OF TWENTY YEARS THEREIN MENTIONED.

The argument of the learned counsel of the plaintiff in error, by which he attempts to sustain the opposite construction, rests upon a series of violent false assumptions:

1. He contends that the contract is a lease of the right to take "the annual seal product" of the Pribilof Islands, and that this was a "right of property," vested in the United States and by them transferred under the contract to the Commercial Company.

In reply to this, I contend that the language of the statutes and the language of the lease show that what was granted was a *mere license*—a license to hunt or fish, "*to take* fur seals;" a license to land on the islands and to send a vessel or vessels there.

The language of the lease is—

> *the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul*, and to send a vessel or vessels to said islands for the skins of such seals.

It requires neither argument nor citation of authority to prove that a grant of a right to fish, or to hunt, conveys no property in the fishes or animals to be taken until they actually are taken and reduced to possession.

The right granted is the right *to take*, not property in the wild things that are the subject of the pursuit.

The right to take was limited; for instance, to take only at certain times and in a certain way. The lessee could not take a single seal in the water. It could take no females, nor any seals less than two years old. Neither Congress nor any other authority has ever declared the seals of the Pribilof Islands to be a domestic herd.

The statute (Rev. Stats., sec. 1963), referring to the sealing privileges, speaks of "the fisheries." It was an industry—a valuable one—but only in the same way that the shad fisheries of the Atlantic coast rivers are valuable.

There is not a word in the statute or the lease indicative of any purpose to treat the seal herd as domesticated property; not a single reference to the annual product. From beginning to end it refers only to "the right to kill" as a license or privilege, and not as a grant of property in the herd.

These rights are constantly referred to in the proceedings, and in the award of the Tribunal of Arbitration, known as the Fur-seal Arbitration, as seal fisheries. The

claim was made by counsel for this Government before that commission, that the United States had a right of protection or property in the fur seals of the Pribilof Islands. The present counsel for the plaintiff in error argued that claim with great ability before the commission. The commission, however, took the other view, and decided that the United States had not any right of protection or property in the seal herd.

Of course the United States could not be bound by a claim of this kind made by its counsel in a case with another nation, especially as the claim so made was there disallowed.

(2) Having attempted to establish the position that the seal herd was property, although not reduced to possession, counsel then propounds another erroneous proposition. He asserts (Brief, p. 25) that the right leased was a right to take the annual product limited by *law* to 100,000.

No such right ever existed under either lease. The statute never mentioned a maximum of 100,000. It did fix for a period of twenty years, expiring July 1, 1890, a maximum limit of 75,000 per annum for St. Paul and 25,000 for St. George, which is a very different thing from "limiting the annual product of the islands to 100,000."

(3) Counsel for the lessee, in the development of his argument, makes this further erroneous statement (Brief, p. 28):

> By the act of 1870 one scheme of leasing was established and made applicable alike to the first and every subsequent lease. Every provision of

> this act was reenacted by the Revised Statutes, and no new ones were added. It is equally clear that the two pieces of legislation were intended to be, and in fact are, the same; and the present lease is consequently of the same right, with all its incidents, as that of the first lease.

It is unnecessary to follow the line of reasoning of the defendant in the effort to support this contention. Undoubtedly the Revised Statutes were intended to reenact substantially the act of 1870, and undoubtedly they did so.

The vital fault in the argument for the defendant is that it ignores the most important circumstance of all, namely, that whether we refer to the act of 1870 or to the Revised Statutes, *the limitation of a maximum number was expressly made only for a period of twenty years from July 1, 1870.* No possible twisting or contortion of the language of the statutes can get that fact out of the case.

Counsel, on pages 30 and 31, asserts that the contention of the Government involves the assertion that by the Revised Statutes certain "momentous changes" were effected in this scheme of future leases. That is denied on behalf of the United States. The act of 1870 and the Revised Statutes both provided that after July 1, 1890, the limit upon the maximum, and the provisions for a proportionate reduction of rental in case of a modification by the Secretary, should not apply.

The changes were not effected by the Revised Statutes. Whatever difference in the scheme of leasing might exist between a lease made in 1870 and one made in 1890 arose out of the terms of the original act as well as out of the terms of the Revised Statutes.

I am not referring at present to the act of 1874.

Counsel admits (Brief, p. 32) that the limitation of the number to be taken was, in the first instance, in the original act, confined to the period of twenty years. He contends, however, that so far as future leases were concerned it was continued and made applicable to them in explicit language by the terms of section 1968, which corresponds to section 5 of the act of 1870. Thus the learned counsel is contending for the following extraordinary proposition: That by section 1962 a limitation of the number to be taken was created to continue only for twenty years, while by a subsequent section of the same act, passed at the same time, this limitation was extended indefinitely and made applicable to all leases, even such as might run beyond the period of twenty years.

The learned counsel undoubtedly perceived the absurdity of this position, for he suggests (Brief, p. 35) that it would naturally be asked what the purpose of Congress was in confining the limitation of the fixed maximum to a period of twenty years.

His answer to this question is certainly not an instance of lucid explanation.

His failure to answer it warrants me in repeating the question: What was the purpose of Congress in confining the limitation of the fixed maximum to a period of twenty years? It is not necessary to ask what the purpose of Congress was; the question is, did Congress clearly make such a limitation? To that the answer can be only of one kind.

I agree with the rule of construction quoted by counsel for the plaintiff in error on page 43 of his brief:

> An author must be supposed to be consistent with himself; and therefore if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect the work of the legislature is treated in the same manner as that of any other author. The language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.

It is also a well-known rule of construction that effect must be given, if possible, to all parts of a statute. Such effect is a natural, ordinary, reasonable one, and not a forced or distorted one, if there is an obvious and natural one to be discovered.

Now, the argument of the learned counsel for the plaintiff in error would utterly destroy that provision of this legislation which refers to the period of twenty years from July 1, 1870. If his construction is correct, Congress ought not to have used those words or referred to that date. According to his argument, Congress had it in mind when it was considering section 1962 to limit the maximum to a period of twenty years, but a few moments later, when they got to section 1968, they changed their purpose and determined to extend the limitation indefinitely; and yet they passed the act without striking out the former provision.

WHAT IS THE CONSTRUCTION OF SECTION 1968?

If it can have a construction that is reasonable, and at the same time consistent with and not destructive of the provisions of section 1962, that construction should be placed upon it by the court.

The section reads as follows:

> If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceedi ıg the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or in case the same have been disposed of, then such person or company shall forfeit the value of the same.

It is transcribed from the latter part of section 5 of the act of 1870.

The words "in this act prescribed" were originally used in the act of 1870, and were copied in the same form into the Revised Statutes. So, also, were the words "under any lease herein authorized."

Originally, therefore, this lease was intended to put a forfeiture upon persons violating the lawful limitation.

It was continued in the same language in the Revised Statutes, and was doubtless intended to apply to the lease then pending as "a lease therein authorized."

It had, however, up to the 1st of July, 1890, an active, valuable, and sufficient purpose.

By section 1963 it was directed that when the lease to the Alaska Company or any future similar lease should expire, or be surrendered, or forfeited, or terminated, the

Secretary should make a new lease. If, therefore, the lease of the Alaska Company had been surrendered, or forfeited, or terminated at any time before July 1, 1890, it would have been incumbent on the Secretary to relet. The lessee under the new lease would have been subject to the limitation of section 1962 for the balance of the period of twenty years, and the Secretary of the Treasury would have been subject also to that limitation. It therefore was entirely reasonable and proper to provide for a forfeiture against any new lessee who might come in under a lease made upon the happening of the contingency provided for by section 1963. If this construction is not correct, then in case the Alaska Company's lease had been surrendered, or declared terminated in accordance with the power reserved to the Secretary of the Treasury, on the first of July, 1873, there would have been no law to enforce a forfeiture of the skins against any lessee who killed an excess of 75,000 in any one year upon the island of St. Paul, or an excess of 25,000 on the island of St. George.

A lease made under the circumstances above supposed would have been a lease "herein authorized."

There was a number for each island prescribed in that chapter, but prescribed for only twenty years.

Such a construction as this renders the whole law entirely clear and harmonious, while the opposite contention makes it necessary to strike out one of the most obvious provisions contained in it.

SECOND POINT.

EFFECT OF THE ACT OF MARCH 24, 1874.

It is profitless to discuss the effect of this act upon the lease to the Alaska Company.

Section 1972 reserved to Congress the right at any time to alter, amend, or repeal sections from 1960 to 1971, and it may very well be urged on behalf of the United States that whatever rights the Alaska Commercial Company obtained under its lease were subject to modification by subsequent legislation.

There can be no question, however, that when the present lease was made it was made subject to the Revised Statutes as amended by the act of March 24, 1874.

I have heretofore pointed out that the act of 1874 amends the Revised Statutes in two particulars: First, by authorizing the Secretary of the Treasury to designate the months in which seals may be taken for their skins; second, by authorizing the Secretary to designate the number to be taken on and about each island, respectively.

This was a substitution of the discretion of the Secretary for its own previously fixed declaration in these two particulars.

The Government does not claim, as is said by the counsel for the plaintiff in error, that the act of 1874 abrogated the whole system of leasing. There never was any such system of leasing as counsel contends for in his brief. What the act of 1874 did was to amend the law. An amendment is of no use unless it effects some change in the law.

Counsel says (Brief, p. 41):

> The act of itself changed nothing; but when the authority given by it was exercised, the change was effected.

The act did change something. It changed the law, and that is what it was passed to do. It gave authority to the Secretary of the Treasury—authority which he had not previously possessed. It was a grant of power—a conferring of discretion, the designation of the person who, in behalf of the Government, should from time to time regulate the times and seasons of killing and number of seals to be killed.

This statement of the purpose of Congress disposes of the contention that when the Secretary had once exercised his authority under the act of 1874 he had exhausted it, and that his designation then became the permanent, arbitrary, general designation.

It is insisted that the reasonable construction of this act is that he had a continuing discretionary authority.

As a matter of fact, he twice modified the respective numbers permitted to be killed by the Alaska Company under its lease. (Rec. p. 135.)

The lease contains a covenant that the lessee will not kill in any year a greater number of seals than is authorized by the Secretary, thus expressly recognizing the Secretary's power to fix the number.

From the nature of the act concerning which the Secretary was to exercise discretion, it is obvious that its repeated exercise is necessary to accomplish the legislative purpose. The original act recognized that it might be desirable for the preservation of the seal industry to

modify the number to be killed in different years. The act of 1874 put this discretion fully in the Secretary. It was essential that he should have the power to adapt his orders to the circumstances of each succeeding year. The passage of the act of 1874 was a declaration by Congress that the establishment of a fixed number by statute for even so brief a period as twenty years was unwise; that the conditions affecting such a subject as the possible yield of a fishery were too uncertain to be governed by the rigid provisions of a statute. The very nature of the subject-matter shows that it was the purpose of Congress that this power vested in the Secretary should be a permanent one, to be exercised from time to time as he deemed advisable.

It is a confusion of ideas to say, as is said in the brief of the learned counsel, that Congress intended that whatever effect the act should have, it should immediately have. Unquestionably, as a mere statement, that is true, *but the effect of the act was not to vary the maximum, but to confer authority on the Secretary, and, of course, it had that effect as soon as approved.*

THIRD POINT.

THERE HAS BEEN NO DEPARTMENTAL CONSTRUCTION OF THIS LEGISLATION WHICH IS BINDING OR EVEN INFLUENTIAL UPON THE COURT.

It is only in doubtful cases and where the action is on its face in accordance with the statute that the courts will adopt a departmental construction of a statute. (*United States* v. *Tanner*, 147 U. S., 661.)

It has been proved that the claim of the Government under the lease during the years 1891 and 1892, in which the *modus vivendi* was in operation, and even for the year 1890, prior to the *modus vivendi*, was adjusted with the lessee by Mr. Secretary Foster. In 1890 the lessee took about 21,000 seals. The evidence of the Government agent, Mr. Goff, shows that it was the utmost number they could take of merchantable skins.

The lessee certainly took all the risk of a catch reduced by natural causes. If from natural causes it had not been able to get a single merchantable skin in any year of its lease, it would have been bound nevertheless to pay the annual rental of $60,000. It is hard to see, therefore, what lawful right the Secretary had to make any abatement of rent, at least for the year 1890. He did, however, abate the rent for that year. He took the position that the annual rental of $60,000 was subject to abatement in the proportion of the number taken to an annual catch of 100,000. But he held in that year that the *per capita* royalty and revenue tax were not subject to abatement. He settled with the lessee for the year 1890, charging the whole *per capita* royalty and revenue tax on 20,995 skins actually taken and shipped, and a rental of 60 cents per skin for the same amount; in all, $214,673.88. According to the testimony, the gross price received for these skins by the lessee in the London market was 146 shillings apiece, something over *$757,000*.

For 1891–92 the Secretary settled with the lessee on a different basis. He treated both the rental and the *per capita* royalty as subject to abatement. In 1891 the

lessee obtained 13,482 seal skins, for which it received in the London market *$404,000*. The claim of the Government for that year was settled for *$46,749.23*.

In the year 1892 the lessee took 7,549 skins, for which, under the lease, the Government was entitled to receive $132,659.12. The defendant company was allowed to settle upon payment of *$23,972.60*. For the skins taken in that year they received in the London market *$227,000*.

These constructions varied in different years, so that it is impossible to allege that any one of them furnished a rule of construction. There were conflicting opinions from the Department of Justice: One by Mr. Solicitor-General Taft (20 Op., p. 51); a supplemental opinion by Mr. Taft (20 Op., p. 62); an opinion by Mr. Attorney-General Miller, dated January 17, 1893 (20 Op., p. 51); an opinion by Mr. Solicitor-General Maxwell (20 Op., p. 634); and, finally, one by Mr. Attorney-General Olney (20 Op., p. 732).

FOURTH POINT.

IN VIEW OF THE PLAIN MEANING OF THE ACT OF 1874, IT IS NOT PERMISSIBLE TO RESORT TO THE STATEMENTS MADE IN CONGRESS AT THE TIME OF THE PASSAGE OF THAT BILL IN ORDER TO ASCERTAIN THE PURPOSE FOR WHICH IT WAS PASSED.

The citations from the Congressional Record are merely the remarks of individual members of the House and Senate. Assuming that they correctly state the object of the law, its operation would not necessarily be limited to the especial purposes which they declare.

It is submitted, however, that an examination of the reasons given discloses that the reasons given in the House do not correspond with the reasons given in the Senate.

### FIFTH POINT.

THE CLAIM OF THE UNITED STATES BEFORE THE BERING SEA ARBITRATORS FOR DAMAGES UNDER ARTICLE V OF THE MODUS VIVENDI OF MAY 9, 1892, GIVES NO SUPPORT EITHER AS AN ESTOPPEL OR AS AN ADMISSION AGAINST INTEREST TO THE LESSEE'S CLAIM FOR DAMAGES IN THIS ACTION, OR TO THE CONSTRUCTION OF THE LEASE AND STATUTES FOR WHICH IT CONTENDS.

Article V of the *modus vivendi* of 1892 is as follows:

#### ARTICLE V.

> If the result of the arbitration be to affirm the right of the British sealers to take seals in Bering Sea within the bounds claimed by the United States under the purchase from Russia, then compensation shall be made by the United States to Great Britain (for the use of her subjects) for abstaining from the exercise of that right during the pendency of the arbitration, upon the basis of such a regulated and limited catch or catches as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds; and, on the other hand, if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens, and lessees) for this agreement to limit the

island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds.

The amount awarded, if any, in either case shall be such as under all the circumstances is just and equitable, and shall be promptly paid.

In the course of the Behring Sea arbitration the claim was originally made by the United States for the recovery of the damages which it and the company, its lessee, sustained by reason of this article. Such a claim was presented by the United States in its "case" (pp. 286 to 291). It was claimed that the Government was entitled to such amount as would have been due from the company for the additional take of 30,000 seals over and above the 7,500 that were taken in the year 1892, and it was therefore claimed that its lessee was entitled to the profits on such additional number of skins. Counsel for the plaintiff in error use this demand of the United States as evidence, or as an admission of the fact, that 30,000 additional seals could have been taken. The first answer to this is, of course, that the counsel for the Government expressly admitted that the evidence failed to establish any such fact. In the volume entitled "Argument of the United States," signed by all the counsel, including the counsel for the defendant in this case (vol. 9), at page 216, Mr. Blodgett, one of the counsel for the United States, made this statement:

Frankness requires us, as we think, to say that the proofs which appear in the counter case of the United States as to the condition of the seal herd on

> the Pribilof Islands show that the United States could not have allowed its lessees to have much, if any, exceeded the number of skins allowed by the *modus vivendi* of 1892 without an undue diminution of the seal herd, and upon this branch of the case we simply call the attention of the tribunal to the proofs, and submit the question to its decision.

On May 31, 1893, the Honorable Edward J. Phelps announced that the United States would not, on its behalf, ask the tribunal for any finding for damages upon and under article 5 of the convention or *modus vivendi* of 1892. (*Vol. 1 of Proceedings* (*American edition*), *p. 34.*)

This is in evidence in the case.

For the purpose of the present action it is still more in point that the case of the United States was required by the treaty of arbitration to be presented, and was in fact presented, before the close of the year 1892, so that the take, or probable take, for 1893 was not brought into question at all under the evidence. The fact that more might possibly have been taken in 1892 does not show that more could have been taken the next year. In fact, however, the urging of this claim by the United States before the Tribunal in no way estops them. It was not between the same parties as in this action, and the officers who presented the case of the United States had no authority to bind the Government for any other purpose than the cause intrusted to them. Their powers and duties are expressed by the statute and clearly did not extend to making an admission estopping the United States in any such proceeding as the present. The right of Government officers to bind the United States by estoppel has

been repeatedly denied by the courts in cases in which it was brought into question, except in so far as the statute expressly authorizes them to bind the United States. (*Carr* v. *United States*, 8 Otto, 433; *Case* v. *Terrill*, 11 Wall., 199; *Lee* v. *Munroe*, 7 Cranch, 366; *Reed* v. *United States*, 11 Wall., 591; *Finn* v. *United States*, 123 U. S., 227; *Kinkhead* v. *United States*, 150 U. S., 483, pp. 495–96.)

The proceedings in respect to this claim really show that the United States acted merely as the agent for its lessee in presenting this claim to the Bering Sea Tribunal. The lessee took the number allowed (7,500) by the Secretary as a quota under the lease, and hoped to get a finding in its favor from the arbitrators entitling it to damages from Great Britain. In the letter of June 27, 1892, from Secretary Foster to Mr. Jeffries (Ex. No. 21, R., p. 140), acknowledging receipt of the money paid in settlement of the catch of 1891, he says:

> It is understood that this adjustment is accepted by said company as full settlement and satisfaction of all claims and demands against the United States for whatever cause to the date thereof, except only as to its right to claim any amount which may be awarded to it by the arbitrators appointed by Great Britain and the United States under the treaty of April 18, 1892.

The claim presented by the United States to the Arbitration Tribunal on behalf of the defendant was not presented as a claim which the defendant had against the United States *under the lease*. It involved no question

of the powers of the Secretary in respect to the lessee under the covenants of the lease.

SIXTH POINT.

THE CONSTRUCTION OF THE LEASE CAN NOT BE AFFECTED BY CONSIDERATION OF THE HARDSHIP THE LESSEE WILL SUFFER BY ENFORCEMENT OF THE CONTRACT INTO WHICH IT HAS VOLUNTARILY ENTERED.

The contract must be enforced, however severe the enforcement of it may seem to be; but the plaintiff in error really took very little risk in making such a contract. Obviously at the time the lease was made it was supposed that 60,000 could be taken annually. On such a basis the *per capita* royalty was intended to be the principal compensation to the Government. The reservation of this *per capita* royalty made it directly to the interests of the Government to allow the largest possible catch, and the lessee might very naturally trust to such a self-regulating provision as this. This provision by its own operation carried out the spirit of the proviso to section 1962 in respect to reduction of rent.

But, however this may be, it is not at all unusual for a contractor with the State to place himself entirely at the mercy of the public officer who has control of the subject matter. There is a class of contracts frequently before the courts in which the contractor is in just such a position. In almost all contracts now made for great public works the contractor absolutely agrees to abide by the final certificate of the engineer or architect who has charge of the work. The contractor's fortunes are placed

in the hands of this official, and it has frequently been determined by the court that the only restriction upon the powers of the engineer or the architect is that he shall act in good faith. (Opinion of circuit court, R., p. 16.)

Courts can not relieve from possible hardships of contracts. They must regard the sanctity of contracts and enforce performance as agreed. (*Smoot's Case*, 15 Wall., 36; *The Harriman*, 9 Wall., 161.)

Counsel for plaintiff in error insists that his client would never have entered into a contract based upon such a precarious hope as arises from the construction put upon the law by the Government.

It is not unusual for persons to invest capital in risky ventures. Very few persons have the opportunity to bet on a sure thing. Except for the destruction of the herd by the open-sea fishing, the contract of the North American Commercial Company would have been very profitable. It is impossible to say from any evidence in the case that it has not been unprofitable, even under the circumstances that have existed since 1890. The figures previously given as to prices obtained for skins sold in London would seem to indicate that the profits were very large. It appears from the evidence (Rec., p. 57) that the amount realized to the company for the catch of 1893 was about $24 a skin, amounting to $180,000.

SEVENTH POINT.

The trial court found that, pursuant to the *modus vivendi*, the United States prohibited and prevented the

defendant from taking any seals from the island during the year 1893, and thus deprived the defendant of the benefit of its lease. (Rec., p. 24.)

While this is classed as a finding of fact, it is submitted that it is in reality a conclusion of law which the United States have a right to oppose so far as they may be affected by such finding in this case. The limitation imposed by the treaty was a political act of the Government, and hence any loss which the defendant suffered by reason thereof was in the nature of *damnum absque injuria*. Regulation of fisheries is part of the police power of the Government. (*Smith* v. *Maryland*, 18 How., 71; *Lawton* v. *Steele*, 152 U. S., 133.) Sovereign powers of government can not be parted with by legislation or contract (*Stone* v. *Mississippi*, 101 U. S., 814):

> In 1867 the legislature of Mississippi granted a charter to a lottery company for twenty-five years in consideration of a stipulated sum in cash, an annual payment of a further sum, and a percentage of receipts from the sale of tickets. A provision of the constitution adopted in 1868 declares that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." *Held*, I. That this provision is not in conflict with sec. 10, art. 1, of the Constitution of the United States, which prohibits a State from "passing a law impairing the obligation of contracts." Such a charter is in legal effect nothing more than a license to enjoy the privilege conferred for the time, and on the terms specified, subject to future legislative or constitutional control or withdrawal.

In the *Sinking-Fund Cases* (99 U. S., 700, 718) it is said:

> The United States can not, any more than a State, interfere with private rights, *except for legitimate governmental purposes.*

In the same case, considering the effect that should be given to the power of repeal, alteration, and amendment reserved in the statute relating to the Union Pacific and Central Pacific Railroad companies, it is said:

> In the act of 1864, section 22, it is provided "that Congress may at any time alter, amend, and repeal this act." Taking both acts together and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains but has given special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit no one can doubt. All agree that it can not be used to take away property already acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller* v. *The State* (15 Wall., 498), "it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors and for the proper disposition of its assets," and again, in *Holyoke Company* v. *Lyman* (id., 519), "to protect the rights of the public and of the corporators or to

promote the due administration of the affairs of the corporation."

Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson* v. *Jessup* (Id., 459), he said, "the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State;" and again, as late as *Railroad Company* v. *Maine* (96 U. S., 510), "by the reservation * * * the State retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities." Mr. Justice Swayne, in *Shields* v. *Ohio* (95 U. S., 324), says, by way of limitation, "The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration." The rules as here laid down are fully sustained by authority.

The Government never parted with, and could not divest itself of, the power to regulate seal fisheries in the interest of the preservation of the species. The lease was taken by the company subject to that inalienable power. If the limitation imposed by the *modus* was in violation of the fair terms of the contract as made by the Secretary of the Treasury (which is denied by the United States), the company might have treated it as broken and have refused to accept any performance whatever and it would not then have been liable to pay the rental. But it did not elect to regard the lease as broken.

It accepted the limitation, and therefore should be deemed to have assented to the exercise of the sovereign power of regulation exercised by the Government by means of the *modus*.

"Acts done in the proper exercise of governmental powers, and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the Constitution." (*Gibson* v. *United States*, 166 U. S., 269.)

The prohibition by the *modus* was not unreasonable. It was not a hardship on the lessee; it was for its benefit. If the lessee lost $13,000 or $20,000 in one year by reason of the prohibition, even if it never in any later year capture those same seals, it was because the Government was trying to preserve something for the future years of the lease—to save the race from extermination.

The Secretary's authorization of the number of seals to be taken in any year was expressed in his instructions to the chief agent of the Government on the islands prior to the departure of the agent for the islands in the spring of the year. These instructions were always communicated by the agent to the lessee. In the season of 1893 the Government supervising agent was Joseph B. Crowley. Instructions were issued to him on April 26, 1893. The lessee's superintendent received, and had in his possession, a copy of the instructions before the commencement of the season of 1893 (Rec., p. 32). The instructions are printed on page 124 of the record.

In a letter from N. L. Jefferies, attorney for the company, dated November 15, 1893, to the Secretary of the Treasury, he says:

> During the present year this company, in strict compliance with the orders of the Treasury Department, restricted its catch to 7,500. (Rec., p. 130.)

This clause also occurs in the instructions to Agent Crowley:

> This matter is, however, left, as above stated, to your discretion, and in reference thereto you will confer fully with the representative of the company, its interest and those of the Government in the preservation of the fur-seal industry being identical.

These instructions show conclusively that the Secretary of the Treasury considered that 7,500 skins should be taken by the lessee in the year 1893, and that that number was practically authorized by him.

The great seal fisheries of the Pribilof Islands were not a piece of property merely, but a branch of commerce, to be dealt with by the Government as a sovereign and not as a corporate owner. They were to be regulated as the Government regulates interstate, foreign, or Indian commerce.

It is apparent from the law of 1870, the first lease, the Revised Statutes, and the act of 1874, that they were so regarded. Neither the particular Congress of 1870 nor the Secretary of the Treasury in leasing lost sight of the fact that it was a matter of that kind. Accordingly we have an instance of what was, or what the Government saw fit to recognize as, an exercise of the police power

such as one legislature or executive can not exhaust or tie up or bargain away. (*Beer Company* v. *Mass.*, 97 U. S., 33; *Stone* v. *Mississippi*, 101 U. S., 814.)

A mere license to engage in the seal-fishing business was given to the company, and Congress in 1870 expressly reserved to the Government the power to make whatever regulations of the business it might by law or executive act from time to time see fit to make.

Revised Statutes, section 1963, under which the later lease was made, was a condensation and abbreviation of the prior leasing section. It was immediately followed by the act of 1874, authorizing the Secretary to designate the month for taking seals and the number to be taken.

In leasing under section 1963 he was to have due regard to the interests of the Government and the protection of the fisheries; and when he made the second lease, he took pains to make it clear that the interests of the Government included the preservation intact of the whole police power to regulate the business.

He expressly stipulated that the company should abide by all rules and regulations concerning the taking of seals which he or his successors might make *in pursuance of law*, and concerning the comfort, morals, or other interests of the inhabitants of the islands, and all matters pertaining to the islands. This reserved the right to make future laws. He also expressly stipulated that the company should abide by any restrictions and limitations he or his successors might make upon the right to kill seals in order to preserve the fisheries. And then, as an independent provision, it was expressly stipulated

that the company was neither to kill, nor permit to be killed, a greater number in any year than the Secretary might authorize.

The license or lease was taken burdened with any regulations under any laws, past or future, that any Secretary, present or future, might make. The right to make any laws whatever looking to the regulation of the fisheries was thus recognized in the lease. A treaty is a law. It is submitted that the true construction of this lease of the right to take seals makes it subject to the whole police power of the Government, and that the lessee had no right to complain of any regulation that the Government saw fit to make in the exercise of its sovereign power over the fisheries.

For the license thus burdened the company saw fit to agree to pay $60,000 per annum, etc.

It is contended by the Government that the rights reserved in the lease to the Secretary of the Treasury are, upon a proper construction of the transaction, rights reserved to the Government as principal.

The Government is impersonal. It acts and contracts through persons. No more was intended by the law of Revised Statutes, section 1963, than that the Government itself should lease by the hand of the Secretary, but for itself as principal and only lessor.

The company was one party and the Government the other. If it was agreed that the Secretary might regulate under whatever law the Government might make and whoever might be Secretary, this was equivalent to saying that the Government, the real contracting party,

might regulate, and as the greater includes the less so the power to control the Secretary in regulating embraced the power to regulate. Had some independent third party been chosen to regulate, that might be a different matter. But the Secretary would be under the orders of the Government in regulating, since he was to make any regulation he saw fit under any law the Government might choose to pass. The whole free will of the Government was thus reserved, and it is quite immaterial whether the Secretary on his own judgment or in compliance with the will of the Government manifested by law, treaty or otherwise, confined the number of seals taken in one year to 7,500.

The agreement was not to abide by regulations the Secretary might make upon his own judgment only, but also such as he might make *in pursuance of law;* that is, such as the Government might make through him.

Now the *modus vivendi* either bound him as a treaty—which is a law—or it did not. If it did, he was acting pursuant to a law; if not, he was acting upon his own judgment.

In exercising that free judgment, he could be guided by the *modus* or not, as pleased him; for his motive for making a regulation or limiting the catch is quite immaterial. He could limit the catch to preserve the fishery from extinction, or to *increase* it, or for any reason whatever. The lease, like the law of 1874, confines him to no particular reason.

The discretion to be exercised is not that of a particular man whose judgment is relied upon, nor of an officer who

is to reach his conclusion in a particular manner which may be relied upon to produce one result rather than another; but is the discretion of the Government generally, to be manifested by the Secretary acting under whatever orders the Government may from time to time give him and in whatever manner he or the Government sees fit.

Would such a contract fail if the office of Secretary should be abolished? No court would hold so.

The case is somewhat analogous to that of a contract for services. If there is no reliance upon the skill or character of the promisor, he can, upon occasion, perform by proxy or his administrator can perform. (*White* v. *Allen*, 133 Mass., 423.)

It would seem that where a servant contracts for and on behalf of his master, and the other party agrees to confine himself to what the servant or any substituted servant in his place may determine, at the same time leaving the master free to give whatever orders to the servant about the matter he sees fit and make any rules on the subject he sees fit and change the servant whereever he pleases, there should be some indication of an intention to separate the master and servant, or the natural inference will be that whatever the servant can do the master can do. Here it can not be denied that the Government could pass a law under which the Secretary would be compelled to restrict the killing of 7,500 seals; yet it is pretended that what the Government could thus do by law through the Secretary it can not do directly by the law itself. Its whole will was left free, but could be

executed only through a particular servant; yet no different result could have been anticipated by the parties—certainly no result more favorable to the other party.

Nothing is more common than for an undisclosed principal to substitute himself for his agent, and the only restriction upon his doing so is that no greater burden than could have been anticipated by the other party shall result from the failure to disclose and subsequent disclosure. In such cases a promise to permit the agent to determine or select would be a promise to permit the undisclosed principal. It is not apparent that a disclosed principal, particularly a Government, the real maker of the contract through the instrumentality of an official, can not regard itself as in the shoes of the agent, where no difference in the situation of the other party would result.

The present situation can not show the contract or intent or expectation of either party. It might have accidentally come about that the Secretary, after the modus, had permitted less than 7,500 seals to be taken; in other words, the master might have been willing to allow more favorable terms than the servant. The company (finding 12 and answer, paragraph 11) was offered 7,500 skins for 1893, took them, paid the amount (50 cents per skin) fixed by the Secretary under the lease as compensation to the natives for taking and loading the skins, and about the regular annual pay day under the lease tendered the further sum of $23,789.50, being, according to its computation, the full amount due under the lease.

It is evident that there was no thought on either side of any reason for tendering and taking the 7,500 except

by reason of the lease. The company had no other right nor the officials any other authority.

It is also evident from the *treaty* and the tender and acceptance that the tender was all that was intended in the way of performance by the Government for the year 1893. If, therefore, this was a tender of performance under the lease, it was a tender of substantial full performance, and not as part performance. There was no expectation of any further performance in the way of permitting seal taking in 1893.

It was after the tender and receipt, and after the payment of the sum stipulated in the lease as due for taking and loading on board the skins, and with a full knowledge that there would be no further offer of compliance by the Government, that a question arose, not whether the parties had been tendering and accepting and paying under the lease, but as to what further sum was due *from the company* under the lease.

It is submitted that while an acceptance of *part* of a quantity does not require full performance on the other side, yet a tender of substantial performance and acceptance of it in silence prevents the accepting party from denying that there has been substantial performance on the ground that some act was done otherwise than the contract required. That is particularly true where the only difference between full performance and what was tendered is that the principal fixed the number of seals instead of its agent's doing so.

He who does not raise such an objection when he accepts can not be heard to do so after the other party

has parted with its property, for the known purpose of substantially performing its obligation, and the property has been accepted and disposed of. (*Rau* v. *City of Little Rock*, 34 Ark., 303, and authorities cited.)

The company knew that the Government instead of the Secretary had ordered what should be done as to the killing of seals in 1893, as well when it accepted the skins and when it paid the 50 cents and tendered the $23,000 as it knows now. It knew that nevertheless the Government, not regarding the lease as broken, offered to proceed *under it* on the basis of the Government's orders. The company, giving no hint of its dissent, met the Government by corresponding acts under the lease, thus inducing the Government to part with its property.

This was a waiver of any right (if any) to draw the distinction between the Government and the Secretary, and that distinction can not now be asserted. (*Dressel et al* v. *Jordan*, 104 Mass., 407.)

EIGHTH POINT.

UPON THE THEORY ADOPTED BY THE CIRCUIT COURT, THAT THE UNITED STATES HAD ONLY PARTIALLY PERFORMED THE CONTRACT, THE AMOUNT OF THE RECOVERY WAS CORRECTLY ESTIMATED.

The lessee, having taken, received, and sold the 7,500 skins and kept the proceeds without any abandonment or rescission of the contract, or any offer to return the benefits received, is liable, on the contract, to pay therefor.

The rule is correctly laid down in *Benjamin on Sales, 6th American Edition, section 690*, as follows:

> If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity, to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the quantity sold. But the buyer is bound to pay for any part that he accepts, and after the time for delivery has elapsed he must either return or pay for the part received, and can not insist upon retaining it without payment until the vendor makes delivery of the rest.

(See also *German Savings Institution* v. *Refrigerating Co.*, 70 Federal Reporter, 146, 149; *Kelsey* v. *Ward*, 38 N. Y., 83; *Cincinnati Siemens Co.* v. *Western Siemens Co.*, 152 U. S., 200.)

NINTH POINT.

The defendant's counterclaim was properly disallowed.

1. The court had no right to consider or allow the counterclaim, because it had not been presented to the proper accounting officer, namely, the Auditor for the Treasury Department, for examination.

The statutes governing this subject are *section 951, Revised Statutes:*

> In suits brought by the United States against individuals *no claim for a credit* shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their

examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

And the *Act of July 31, 1894* (28 Stat. L., 162, sec. 7):

> Accounts shall be examined by the auditors as follows: The Auditor of the Treasury Department shall receive and examine all accounts relating * * * to Alaskan fur-seal fisheries, and to all other business within the jurisdiction of the Department of the Treasury, and certify the balances arising thereon to the division of bookkeeping and warrants.

Section 8 of the same act provides:

> The balances which may from time to time be certified by the auditors to the division of bookkeeping and warrants, upon the settlements of public accounts, shall be final and conclusive upon the executive branch of the Government.

By section 4 of the same act, page 206, it is provided that—

> The Auditors, under the direction of the Comptroller of the Treasury, shall superintend the recovery of all debts finally certified by them, respectively, to be due to the United States.

It is not claimed that this counterclaim was ever presented to the Auditor of the Treasury Department or ever in any manner passed upon by him.

The evidence shows nothing more than a request to the Secretary of the Treasury to present the claim to the accounting officers. It is not proven that it ever was before the accounting officers. The statute requires that the claim should have been disallowed by the accounting officer, who, at that time, was the Auditor of the Treasury Department. The only evidence of any action taken by any official of the Treasury Department is the letter signed by the Assistant Secretary of the Treasury, who says: "I have to inform you that the claim is rejected hereby." (Ex. 33). Neither the Secretary of the Treasury nor the Assistant Secretary were accounting officers of the Treasury. In *United States* v. *Gilmore* (7 Wall, 491) it is held that evidence of the presentation and allowance or disallowance of a claim must be taken from the books of the Treasury, and that evidence of that nature is indispensable. The statement, therefore, of the Assistant Secretary of the Treasury that the claim was rejected was no evidence to prove that it was rejected by the Auditor of the Treasury Department. The presentation of a proper claim and its disallowance by the Auditor of the Treasury were necessary to be proved in the first instance as the foundation for proof of the merits of the claim itself. Until such foundation was laid, no proof of the merits of the claim should have been permitted. In *Watkins* v. *United States* (9 Wall., 759) it was held that no claim is lawfully presented under Revised Statutes 951 unless accompanied by a statement of the items and the vouchers in respect thereto. See, further, as to the necessity under Revised Statutes 951 of presenting claims to the proper accounting officer, *Ware* v.

*United States* (4 Wall., 617, 629) and *United States* v. *Giles* (9 Cranch., 212, 236).

Although the counterclaim was in its nature a claim for an undetermined amount of damages depending upon facts to be proved by evidence partly resting in the opinion of witnesses, nevertheless it was in the nature of an account within the meaning of the act of July 31, 1894 (28 St. L., 162, sec. 7).

The undoubted purpose of Congress was to make this provision apply to claims of every nature which might require the payment of money or the allowance of money by the United States.

In section 951 the language is "*no claim for a credit*" shall be admitted upon trial.

There is no reason to hold that a claim for unliquidated or undetermined damages should be excepted from the meaning of this language. Every reason which makes it proper to submit claims for definite sums makes it also proper to submit claims for undefined amounts to the officers established by law for that purpose.

The object of the legislation seems to have been to provide a means by which a balance might be struck between the United States and individual claimants. Section 8 directs that the balances which may from time to time be certified by the Auditors shall be final and conclusive upon the executive branch of the Government. Thus final and conclusive effect is given by the statute to the judgment of the Auditor. Even the Secretary of the Treasury himself can not overrule such decision. Much less can the Secretary of the Treasury make the decision in the first instance.

Counsel for the plaintiff in error, conscious evidently of the fatal defect in his counterclaim, has shifted his ground from the position occupied by him in the argument before the circuit court of appeals, and now claims that, although it may be true that the damages of the defendant set up in its counterclaim can not be considered and passed upon as a matter of affirmative relief, yet they may be available to the defendant as a matter of *defense* to the action. This result he seeks to obtain by an extension of the doctrine of partial failure of consideration into the modern doctrine of recoupment.

No doubt as between private individuals in litigation it is true, as stated by this court in *Withers* v. *Greene* (9 How., 213, 230), that—

> It has repeatedly been decided by learned and able judges in our own country, when acting not in virtue of a statutory license or provision, but upon the principles of justice and convenience, and with the view of preventing litigation and expense, that where fraud has occurred in obtaining or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied upon as defense by a party when sued on such contracts.

In *Dushane* v. *Benedict* (120 U. S., 630, 637) this court, speaking by Mr. Justice Gray, says:

> In an action for the price of goods sold, or of work done, the defendant may set up a breach of warranty or a false representation as to the goods, or a defective performance of the work, by way of recoupment of the sum that the plaintiff may recover. In England this is only allowed so far as it effects the

> value of the goods sold, or of the work done. (*Davis* v. *Hedges*, L. R., 6 Q. B., 687, and cases there cited.) But in this country the courts, *in order to avoid circuity of action*, have gone further and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence of the plaintiff growing out of and relating to the transaction in question.

The object of allowing this recoupment in cases where it does not affect the value of the goods sold or the work done, but relates to other and separate provisions of the same contract, is expressly stated to be the avoidance of circuity of action. It is so stated in the case of *Harrington* v. *Stratton* (22 Pick., 510, 517), where Mr. Justice Dewey says:

> It is always desirable to prevent a cross action where full and complete justice can be done to the parties in a single suit, and it is upon this ground that the courts have of late been disposed to extend to the greatest length *compatible with the legal rights of the parties* the principle of allowing evidence in defense or in reduction of damages to be introduced rather than to compel the defendant to resort to his cross action.

The same reason is given in *Winder* v. *Caldwell* (14 How., 434, 443).

*Nichols* v. *Dusenbury* (2 N. Y., 286) was an action which arose out of a distress for rent. As a matter of recoupment, defendant set up the failure to complete the building in accordance with the contract of lease. The court said:

> It is a matter which is never pleaded in bar. It is in the nature of a cross action. The right of

> the plaintiff to sue is admitted, but the defendant says he has been injured by the breach of another branch of the same contract on which the action is founded, and claims to stop, cut off, or keep back so much of the plaintiff's damages as will satisfy the damages which have been sustained by the defendant.

In *Price* v. *Reynolds* (39 N. J. L., 171) it is said:

> The doctrine of recoupment is unknown to the common law.
>
> In recoupment a breach of the contract in suit alleged to have been committed by the plaintiff is set off against the alleged breach of another stipulation in another contract forming the basis of the suit. It is allowable to rebut the consideration, but not to interpose a counterclaim to the cause of action of the plaintiff.

Whatever may be the rule of law to be applied in this court as to counterclaims in the nature of recoupment in suits between private individuals, *in cases where the United States is a party, no claim of set-off or counterclaim by way of recoupment can be allowed unless the defendant has complied with the requirements of the United States Statutes with reference to claims for credit.* Of course, in an action brought by the United States against an individual for the price of goods sold and delivered it would be competent by way of defense to show that the goods were of an inferior quality, or any other circumstances arising out of the nature or character of the goods themselves that would tend to lessen their value, and thereby to lessen the amount of the recovery. But admitting the correctness of the demand of the United States as a plaintiff for the particular items sued on, it is not proper under the statutes to permit a defendant to set up, by

way of defense or in reduction of the amount due the plaintiff, a claim for damages arising out of the alleged violation of a separate covenant in the same contract.

In the language of Chief Justice Beasley, "it is allowable to rebut the consideration, but not to interpose a counterclaim to the cause of action."

"No action of any kind can be sustained against the Government itself for any supposed debt, unless by its own consent, under some special statute allowing it." (*Reeside* v. *Walker*, 11 How., 272, 290.) In that case the court further says:

> The sovereignty of the Government not only protects it against suits directly, but against judgments even for costs when it fails in prosecutions. *Such being the settled principle in our system of jurisprudence, it would be derogatory to the courts to allow the principle to be evaded or circumvented.*
>
> To permit a demand in set-off against the Government to be proceeded on to judgment against it would be equivalent to the permission of a suit to be prosecuted against it. And however this may be tolerated between individuals by a species of reconvention, when demands in set-off are sought to be recovered it could not be as against the Government except by a mere evasion, and must be as useless in the end as it would be derogatory to judicial fairness. A set-off or reconvention is often to be treated as a new suit by the defendant, and the pleadings and judgment are to be made to correspond.

See also *Watkins* v. *United States* (9 Wall., 759). In that case it is stated:

> Whether the claim for credit is a legal or *equitable claim*, if it has been duly presented to the accounting officers and has been by them disallowed, it is

the proper subject of set-off under that act, but it can not be adjudicated in a Federal court unless it has been so presented and disallowed.

Questions of set-off in the Federal courts arise exclusively under the acts of Congress, and no local law or usage can have any influence in their determination. *Claims for credit can not be admitted in suits between the United States and individuals unless they have been duly presented to the accounting officers of the Treasury, and have been by them disallowed, because it is so provided by an act of Congress.* Supported as the ruling of the court is by an act of Congress and by a course of decisions extending through a period of three-quarters of a century, it can hardly be expected that it will be disproved.

The question in this case is not how much the plaintiff is entitled to for its demand. The amount of that is conceded. The question raised by the counterclaim is how much the plaintiff's demand should be reduced or liquidated by the separate and independent demand of the defendant. This is practically setting one cause of action off against another, a thing that can not be done except between ordinary parties in order to avoid circuity of action, and in some States only by virtue of express statutes.

The United States can very well adopt the expression of the law of recoupment quoted in the brief of the learned counsel for the plaintiff in error on page 80:

> The comparatively modern doctrine of recoupment is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and treating the things done and stipu-

lated to be done on each side, as the consideration done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor, *it sums up the grievances on each side instead of the plaintiff's side only, strikes a balance, and gives the difference to the plaintiff if it is in his favor.*

But this summing up the grievances on each side, striking a balance, and giving the difference to the plaintiff, is conditioned, in cases in which the United States is a party, upon the compliance by the defendant with those things which Congress has made a prerequisite for a claim of credit against the Government in suits brought by it against individuals.

The contention of the plaintiff in error is met completely by section 951.

The North American Commercial Company is not without remedy if it has a ground of complaint against the Government sounding in damages arising out of this contract. It can present its claim to the Auditor, and then if disallowed, may bring suit against the Government.

Admitting that the defensive matter urged by way of recoupment might be made use of without borrowing any aid from the statutes of set-off, nevertheless it can not be made use of against the Government, because such use is expressly barred by statute.

In studying the decisions of the different courts relating to questions of set-off, recoupment and counterclaim, it will be observed that great inaccuracy prevails. It will be necessary to examine the facts in each case and the

nature of the particular counterclaim set up in order to ascertain whether the defense claimed an ordinary set-off or recoupment by way of damages limited to the amount of the plaintiff's claim, or an affirmative judgment upon a counterclaim authorized by special procedure.

No error prejudicial to the plaintiff in error appears in the record, and therefore the judgment should be affirmed.

JOHN W. GRIGGS,
*Attorney-General.*

# APPENDIX A.

## COPY OF THE LEASE.

This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the State of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890;

Witnesseth, that the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company, for a term of twenty years from the 1st day of May, 1890, the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the Territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following—that is to say:

To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars; and in addition thereto agrees to pay the revenue tax, or duty, of

two dollars, laid upon each fur-seal skin taken and shipped by it from said islands of St. George and St. Paul; and also to pay to said Treasurer the further sum of seven dollars sixty-two and one-half cents apiece for each and every fur-seal skin taken and shipped from said islands; and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it, made from seals that may be taken on said islands during the said period of twenty years; and to secure the prompt payment of the sixty thousand dollars rental above referred to, the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity or number of dried salmon, and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat, as the Secretary of the Treasury shall from time to time determine.

That it will also furnish to the said inhabitants eighty tons of coal annually, and a sufficient number of comfortable dwellings in which said native inhabitants may reside; and will keep said dwellings in proper repair; and will also provide and keep in repair such suitable schoolhouses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands, the same to be taught by competent teachers who shall be paid by the company a fair compensation; all to the satisfaction of the Secretary of the Treasury; and will also provide and maintain a suitable house for religious worship; and

will also provide a competent physician, or physicians, and necessary and proper medicines and medical supplies; and will also provide the necessaries of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

The said company further agrees to employ the native inhabitants of said islands to perform such labor, upon the islands, as they are fitted to perform, and to pay therefor a fair and just compensation such as may be fixed by the Secretary of the Treasury; and also agrees to contribute as far as in its power all reasonable efforts to secure the comfort, health, education, and promote the morals and civilization of said native inhabitants.

The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States; it also agrees to obey and abide by any restrictions or limitations upon the right to kill seals, that the Secretary of the Treasury shall judge necessary under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

The said company further agrees that it will not permit any of its agents to keep, sell, give or dispose of any distilled spirits or spirituous liquors, or opium, on either of said islands or the waters adjacent thereto, to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.

The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same, at any time, on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any Treasury regulation respecting the taking of fur seals, or concerning the islands of St. George and St. Paul, or the inhabitants thereof.

In witness whereof, the parties hereto have set their hands and seals the day and year above written.

(signatures).